SUBJECT INDEX.

	Page
Preliminary Statement	1
Question	1
Statement of Case	2
Summary of Argument	2
Point I. The order is reasonably adapted to meet an actual public need	3
Point II. The order does not contravene the commerce clause	7
(a) The field of quarantine and inspection laws is one in which the state may act until it is excluded by action of the federal government	7
(b) A clear expression by Congress is required to oust the state from any field appropriate for its action	8
(c) In general, it is held that mere delegation by Congress to an administrative official of the power to make regulations, without action by him, does not oust the state from the field. Oregon-Washington Co. v. Washington is an exceptional case	10
(d) Asbell v. Kansas has interpreted the acts of Congress now involved as not ousting the states until the Secretary of Agriculture takes action	14
(e) The practical interpretation which the acts of Congress of 1903 and 1905 have received for many years is to the same effect as the judicial interpretation in Asbell v. Kansas, and it should be continued	17
(f) In effect the Secretary of Agriculture has adopted the state laws and regulations relative to interstate movement of cattle infected with Bang's disease	18
(g) The order now in question does not "burden" interstate commerce, nor does it in any way conflict with the federal statutes	18
Point III. The decree below should be affirmed	20

TABLE OF CASES CITED.

Page

Asbell v. Kansas, 209 U. S. 251 ..... 2, 7, 9, 14, 15, 16, 17, 18
Atchison Ry. v. Railroad Comm., 283 U. S. 380 9
Costanzo v. Tillinghast, 287 U. S. 341 17
Hannibal, etc. Co. v. Husen, 95 U. S. 465 ..... 7, 18
Kimmish v. Ball, 129 U. S. 217 7
McCaughn v. Hershey Chocolate Co., 283 U. S. 488 17
Minnesota Rate Cases, 230 U. S. 352 7
Missouri, etc. Co. v. Haber, 169 U. S. 313 ..... 7, 8
Missouri, etc. Co. v. Harris, 234 U. S. 412 10
Missouri Pac. Ry. v. Larabee Mills, 211 U. S. 612 10
Must Hatch Inc. Co. v. Patterson, 27 Fed. (2nd) 447 15
National Lead Co. v. United States, 252 U. S. 140 17
Oregon-Washington Co. v. Washington, 270 U. S. 87 ..... 2, 10, 11, 12, 13
Port Richmond Ferry v. Hudson, 234 U. S. 317 8
Rasmussen v. Idaho, 181 U. S. 198 7
Reid v. Colorado, 187 U. S. 137 ..... 7, 14, 15
Savage v. Jones, 225 U. S. 501 9
Smith v. Illinois Bell Tel. Co., 282 U. S. 133 10
Smith v. St. Louis, etc. Co., 181 U. S. 248 ..... 7, 19
United States v. Farrar, 281 U. S. 624 17
United States v. Hoover, 133 Fed. 950 17
United States v. Louisville, etc. Co., 176 Fed. 942 17

STATUTES, ETC., CITED.

Agriculture and Markets Law (N. Y. State) Art. 4 6
" " " " " 17 6
" " " " §§72, 74 6
Cattle Quarantine Act (U. S. Code, Title 21, §§111-132) 11, 12, 14, 15
Farm Produce Act (U. S. Code, Title 7, §§491-497) 12
Importation of Milk and Cream Act (Title 7, §§141-149) 12
Miscelloneous Circular 14 ..... 17, 18
Perishable Ag. Com. Act (U. S. Code, Title 7, §§551-568) 12
Plant Quarantine Act (U. S. Code, Title 7, §161) 11, 12

Supreme Court of the United States

October Term, 1932.

No. 760.

AARON MINTZ and LOUIS MINTZ, copartners, doing business under the firm name and style of Mintz & Mintz,

Appellants,

v.

CHARLES H. BALDWIN, individually and as Commissioner of Agriculture and Markets of the State of New York,

Appellee.

BRIEF FOR APPELLEE.

This is a direct appeal, under Judicial Code, section 266 (U. S. Code, Title 28, §380) from a decision rendered by a three judge District Court, in the Northern District of New York. The majority and dissenting opinions were filed about February 13, 1933, and have not been reported. On March 10, 1933, upon joint motion by counsel for the respective parties, probable jurisdiction was found and the appeal advanced for argument.

Question.

This litigation involves an order made by the appellee, which prohibits bringing into the State of New York any

cattle unless they come directly from herds certified to be free of Bang's disease, also known as bovine infectious abortion. The only question is whether that order contravenes the Commerce Clause. More narrowly stated, the only substantial question is whether Congress, by enacting in 1903 and 1905 the acts now found in U. S. Code, Title 21, sections 120-126, has fully occupied the field in which the order seeks to operate. It is whether Congress has expressed, directly or by clear implication, an intent to forbid such an order. The essential question may be fairly stated as whether the present appeal is to be controlled by *Asbell v. Kansas*, 209 U. S. 251, or by *Oregon-Washington Co. v. Washington*, 270 U. S. 87.

Statement of Case.

Although one judge dissented from the Conclusions of Law below (R. 95-96), all three joined in the Findings of Fact. (R. 91-95). No exception is taken to the correctness or completeness of those Findings, and as they are not long, they are the best Statement of the Case. Substantially the same material introduced the majority and dissenting opinions below. (R. 56-60, 67-70.)

Summary of Argument.

Point I. The order is reasonably adapted to meet an actual public need.

Point II. The order does not contravene the commerce clause.

(a) The field of quarantine and inspection laws is one in which the state may act until it is excluded by action of the federal government.

(b) A clear expression by Congress is required to oust the state from any field appropriate for its action.

(c) In general, it is held that mere delegation by Congress to an administrative official of the power to make regulations, without action by him, does not oust the state from the field. Oregon-Washington Co. v. Washington is an exceptional case.

(d) Asbell v. Kansas has interpreted the Acts of Congress now involved as not ousting the states until the Secretary of Agriculture takes action.

(e) The practical interpretation which the Acts of Congress of 1903 and 1905 have received for many years is to the same effect as the judicial interpretation in Asbell v. Kansas, and it should be continued.

(f) In effect the Secretary of Agriculture has adopted the state laws and regulations relative to interstate movement of cattle infected with Bang's disease.

(g) The order now in question does not "burden" interstate commerce, nor does it in any way conflict with the federal statutes.

Point III. The decree below should be affirmed.

ARGUMENT.

POINT I.

The order is reasonably adapted to meet an actual public need.

Originally the bill of complaint in this case contended that appellee's order:

> "Constitutes an unreasonable and arbitrary regulation, employing means which go far beyond the necessities of the case, and therefore deprives these plaintiffs of their property without due process of law." (R. 9, par. 13.)

Appellee met that tender of an issue by his own affidavit (R. 21-30) and three other affidavits. (R. 30-32, 33-

54, 54-56.) The essential matter in all these affidavits is summarized in that of the appellee, and the others are intended to support it by stating certain relevant facts in greater detail. These affidavits set forth facts concerning the history of Bang's disease regulation, in New York State and elsewhere, and the expert views concerning the nature of the disease and its control published in the seven years immediately preceding the present controversy.

Upon the argument before the District Court, after those answering affidavits were filed and read, appellants amended their bill of complaint to withdraw their tender of an issue under the Due Process Clause. (R. 90.) In their present brief they say their contention under the Due Process Clause is not pressed because they are satisfied it is untenable. (Appellants' brief, page 8).

As the record stands, it contains much material which evidences the good faith, reasonableness and sincerity of appellee's order, and nothing either by way of assertion or evidence which challenges it. The Findings of Fact, particularly findings 13-19 inclusive, all are to the same effect. (R. 94.) Those findings are signed by the three judges, and are merely a repetition of the statements which introduced majority and dissenting opinions (R. 59-60, 70.) The dissenting opinion accepts the appellee's good faith, and says:

> "The result sought to be attained by the October order is highly commendable and appeals to all the members of the Court." (R. 89.)

There is nothing in the bill of complaint or the evidence or the findings which lends any countenance to the statement at page 20 of appellants' brief:

> "Appellants, in the case at bar, submit that appellee's order is so plainly discriminatory in favor of New

> York cattle men, to the prejudice of cattle men in other states, as to suggest at once the question whether such is not really its latent purpose, however artfully it may be clothed in the guise of a public health measure."

Point V of appellants' brief also attempts to raise before this Court an issue which was not presented by the bill of complaint or brief below, and which has no support in the evidence or findings. The point is that the order discriminates in favor of New York cattle dealers and against all others because there is no requirement that cattle moving from herd to herd within New York State come from disease-free herds, as is required for cattle imported into the state. The appellee in his affidavit recognized that such an objection might sometime be raised, and said:

> "At the same time the order was promulgated a plan was initiated to clean up gradually and by voluntary cooperation of herd owners the infected herds within the state. The order is intended to keep out accessions of infection, so that the work of cleaning up, segregating and gradually disposing of reactors, can go on unimpeded. If the herd owners of this state can be assured that incoming cattle are free from infection self-interest will prompt that such cattle be added only to disease-free herds, and the continuance of the order will tend to encourage the rapid increase of Bang's disease-free herds both within and without New York State". (R. 29.)

It is respectfully submitted that no attack upon the reasonableness and good faith of the order is supported upon the record before this Court, and that on the contrary the evidence is all to the effect that the order is reasonably adapted to meet an actual public need.

Under Point III of appellants' brief it is urged that considerations of public health, such as the relations of

Bang's disease in cattle to undulant fever in humans, cannot be considered as furnishing any part of the justification for the order, because the order was issued by the Commissioner of Agriculture and Markets, and all responsibility for public health is placed by certain statutes of New York State upon its Commissioner of Health.

It is unfortunate if the state has so divided the exercise of its police power that an order relating both to the health of citizens and the health of their domestic animals cannot be promulgated without the joint action of two separate departments. We believe it is not so.

Among the responsibilities of the Commissioner of Agriculture are administering a pure food law (Agriculture and Markets Law, article 17) and a dairy products law (article 4). Among his general powers and duties stated at section 22, subdivision 27, is the following:

> "Seize, destroy or denature so that it cannot thereafter be used for food, any unwholesome food or food products sold or exposed for sale on the markets of this state * * * or if it is the product of a diseased animal * * *."

There is nothing in Agriculture and Markets Law sections 72 and 74, under which the present order was issued, which forbids the commissioner to shape and issue his order in the light of the responsibilities placed upon him for public health as well as the health of animals.

But even if the appellee were required to ignore considerations of public health the record shows that he had abundant "probable cause" for his order, and shows no reason to question its moderation or sincerity. Upon the basis that the order is reasonably adapted to meet an

actual public need, which conclusion is our clear right upon the record presented, we come to the principal question involved upon this appeal.

POINT II.

The order does not contravene the commerce clause.

(a) The field of quarantine and inspection laws is one in which the state may act until it is excluded by action of the federal government.

Apparently this proposition is accepted by appellants, and anyway it can readily be established. *Hannibal etc. Co. v. Husen*, 95 U. S. 465, 472; *Kimmish v. Ball*, 129 U. S. 217; *Missouri etc. Co. v. Haber*, 169 U. S. 613; *Rasmussen v. Idaho*, 181 U. S. 198; *Smith v. St. Louis etc. Co.*, 181 U. S. 248; *Reid v. Colorado*, 187 U. S. 137; *Asbell v. Kansas*, 209 U. S. 251.

In *Minnesota Rate Cases*, 230 U. S. 352, at page 406, the Court said:

> "Quarantine regulations are essential measures of protection which the states are free to adopt when they do not come into conflict with Federal action. In view of the need of conforming such measures to local conditions, Congress from the beginning has been content to leave the matter for the most part, notwithstanding its vast importance, to the states, and has repeatedly acquiesced in the enforcement of state laws [citing federal statutes]. Such laws undoubtedly operate upon interstate and foreign commerce. They could not be effective otherwise. They cannot, of course, be made the cover for discriminations and arbitrary enactments having no reasonable relation to health [citing *Hannibal etc. Co. v. Husen*] but the power of the state to take steps to prevent the introduction or spread of disease, although interstate

> and foreign commerce are involved (subject to the paramount authority of Congress if it decides to assume control) is beyond question." [citing many cases, including *Asbell v. Kansas.*]

In *Port Richmond Ferry v. Hudson County,* 234 U. S. 317, at page 331, in another opinion by Mr. Justices Hughes, the matter is stated as follows:

> "It is argued that the mere fact that interstate transportation is involved is sufficient to defeat the local regulation of rates because, it is said, that it amounts to a regulation of interstate commerce. But this would not be deemed a sufficient ground for invalidating the local action without considering the nature of the regulation and the special subject to which it relates. *Quarantine and pilotage regulations may be said to be quite as direct in their operation, but they are not obnoxious when not in conflict with Federal rules.*" [Italics ours.]

(b) A clear expression by Congress is required to oust the state from any field appropriate for its action.

It is true that Congress may command by implication as well as by express words. If the act of Congress plainly expresses an intention that its commands and prohibitions relative to a matter of interstate commerce be not supplemented by state legislation relative to the same subject matter the Congressional intent controls, whether written in express words or necessarily implied in the act.

But an intent to restrain state action in a field otherwise appropriate to it is not lightly to be inferred. In *Missouri etc. Railway v. Haber,* 169 U. S. 613, 623, Mr. Justice Harlan said:

> "This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not

to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."

Mr. Justice Hughes spoke upon this matter, in the case of *Savage v. Jones,* 225 U. S. 501, 533, as follows:

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." [Citing cases, including *Asbell v. Kansas.*]

In *Atchison Ry. v. Railroad Comm.*, 283 U. S. 380, 391-393, Chief Justice Hughes said:

"Such an intention to override existing state authority to deal with local exigencies is not to be imputed to the Congress unless its enactment compels that conclusion * * *. The principle thus applicable has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State."

A long list of cases in which that general principle was applied is set forth by Mr. Justice Brandeis in a footnote at 244 U. S. 156-157.

(c) In general, it is held that mere delegation by Congress to an administrative official of the power to make regulations, without action by him, does not oust the state from the field. Oregon-Washington Co. v. Washington is an exceptional case.

In *Missouri Pacific Ry. v. Larabee Mills,* 211 U. S. 612, the state court had commanded the railway company as a common carrier to supply certain switching service to the milling company. This was affirmed by this Court, notwithstanding that the transportation operations were involved in interstate commerce and the Interstate Commerce Commission had been given power to regulate and determine such differences.

Said the Court:

> "The mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens."

See, to the same effect, *Missouri etc. Ry. Co. v. Harris,* 234 U. S. 412, 417.

In *Smith v. Illinois Bell Tel. Co.,* 282 U. S. 133, 159, Chief Justice Hughes said:

> "The company urges that, as Congress has granted jurisdiction to the Interstate Commerce Commission over the depreciation rates of telephone companies doing an interstate business [citing act] this subject is now completely withdrawn from the power of the State. It is said that two rates of depreciation cannot be charged on the same property. The Interstate Commerce Commission has had the matter under consideration [citing its report] but, so far as we are ad-

vised, a final determination has not yet been made. The Interstate Commerce Commission has its accounting rules with reference to depreciation charges and, pending its order under section 20 (5) of the Interstate Commerce Act, telephone companies, as well as others subject to the act, have been directed to continue to observe these requirements. The company argues that, although the Interstate Commerce Commission has not finally ruled, the action taken by Congress excludes the jurisdiction of state tribunals under familiar principles. [Citing cases, among them *Oregon-Washington Co. v. Washington.*] We are unable to assent to this view. As the Interstate Commerce Commission has not acted finally in the matter, we are not now called upon to consider the scope of its authority in relation to depreciation charges, but we are of the opinion that, in any event, until action has been taken which could be deemed validly to affect the amount to be charged to depreciation in connection with intrastate business so as to affect intrastate rates, the prerogative of the State to prescribe such rates, and the jurisdiction and duty of the statutory court in considering their validity to determine the amount properly allowable for depreciations in connection with intrastate business, are not to be gainsaid."

But if Congress, in connection with its delegation to an administrative official of the power to make regulations, squarely expresses its intention to take the power from the states even while the official is inactive, undoubtedly that intent will control. A majority of this Court decided that *Oregon-Washington Co. v. Washington* presented such a statute.

The act there involved (U. S. Code, Title 7, Sec. 161) had certain similarities to the act now involved. It also had pronounced differences. It was not associated with any provisions for regulatory cooperation between the

states and the federal government,* such as have existed relative to cattle diseases since 1884 and now are found in U. S. Code, Title 21, Sec. 114. Because of this there never had grown up any such body of state regulation around the plant quarantine act as has existed for many years around the cattle quarantine act. The provision in the plant quarantine act that the Secretary should impose a quarantine for each "new" infestation, a provision not found in the cattle quarantine act, strengthened the impression that the Secretary was intended to act immediately and exclusively upon the first appearance of each infestation. The provision in the plant quarantine act that the Secretary should give public notice before imposing a quarantine, likewise not found in the cattle quarantine act, suggested a power exercised in derogation of state power. There were some indications in the record in *Oregon-Washington Co. v. Washington* that the Secretary of Agriculture was not sympathetic with the form of state regulation there involved. (See brief of that appellant, page 35.)

A 1917 amendment (39 Stat. 1165) had changed the plant quarantine act in its most significant language. Before 1917 the act had said, in close parallel to the cattle quarantine act:

> "That the Secretary of Agriculture is authorized and directed to quarantine any State, Territory or District of the United States, or any portion thereof, *when he shall determine the fact that a dangerous plant disease or insect infestation*, new to or not there-

* Immediately after the decision of **Oregon-Washington Co. v. Washington** the federal plant quarantine act was amended to provide that state quarantines and quarantine statutes should be effective unless in conflict with federal measures. Res. Apr. 13, 1926, c. 135; 44 Stat. 250; U. S. Code, Title 7, §161. In the only important statutes affecting agriculture enacted since 1926, Congress has expressly disavowed any intention to nullify state statutes paralleling the federal legislation. These statutes regulate the importation of milk and cream (Act of Feb. 15, 1927, c. 155; 44 Stat. 1101; U. S. Code, Title 21, §148), the prohibition of destruction or dumping of farm produce received in interstate commerce by commission merchants (Act of Mar. 3, 1927, c. 309; 44 Stat. 1355; U. S. Code, Title 7, §496) and perishable agricultural commodities (Act of June 10, 1930, c. 436; 46 Stat. 537; U. S. Code, Title 7, §565).

tofore widely prevalent or distributed within and throughout the United States, *exists in such State or Territory or District* * * *."

The 1917 amendment made it read as follows:

"That the Secretary of Agriculture is authorized and directed to quarantine any State, Territory or District of the United State, or any portion thereof, *when he shall determine that such quarantine is necessary to prevent the spread of a dangerous plant disease or insect infestation,* new to or not theretofore widely prevalent or distributed within and throughout the United States * * *."

The italics are of course ours. Inasmuch as the difference in phraseology came by an *amendment,* there is a presumption that it has some meaning, and it may be inferred from the majority opinion in *Oregon-Washington Co. v. Washington,* at pages 102-103, that the amendment, with its use of the word "*necessary,*" was decisive in that case.

Two justices (Mr. Justice McReynolds and Mr. Justice Sutherland) were unpersuaded even by the implications of the plant quarantine act that it was intended to operate exclusively while the Secretary of Agriculture was inactive. In their dissent they said (page 103):

"We cannot think Congress intended that the Act of March 4, 1917, without more, should deprive the states of power to protect themselves against threatened disaster like the one disclosed by this record.

"If the Secretary of Agriculture had taken some affirmative action the problem would be a very different one. Congress could have exerted all the power which this statute delegated to him by positive and direct enactment. If it had said nothing whatever certainly the state could have resorted to the quarantine; and this same right, we think, should be recognized when its agent has done nothing.

"It is a serious thing to paralyze the efforts of a state to protect her people against impending calamity, and leave them to the slow charity of a far-off and perhaps supine Federal bureau. No such purpose should be attributed to Congress unless indicated beyond reasonable doubt."

(d) Asbell v. Kansas has interpreted the acts of Congress now involved as not ousting the states until the Secretary of Agriculture takes action.

The acts of 1903 and 1905 had been passed soon after it was decided, in *Reid v. Colorado*, that the act of 1884 did not prevent a quarantine upon cattle by state authority. Reading the acts of 1903 and 1905 in the light of that history Mr. Asbell may have flouted the Kansas quarantine law with some confidence.

He brought some cattle into Kansas across its south line in October, 1905. There was no federal quarantine affecting that line. He was convicted in the state courts under a Kansas statute enacted in 1905 which forbade bringing in cattle across the line unless they were inspected and certified to be healthy by a federal or Kansas inspector.

Before this Court, Asbell's counsel referred not only to the Acts of Congress of 1903 and 1905, but also to Rule 13 promulgated by the federal Secretary of Agriculture under them. He urged not only that Congress had by those statutes occupied the field, but that there was a direct conflict between Rule 13 and the Kansas statute. The rule provided as follows:

"From the 1st day of February to the 31st day of October, inclusive, of each year, no cattle shall be transported or driven or allowed to drift from the area quaran-

tined by the Secretary of Agriculture for splenetic fever into any State or Territory or the District of Columbia or portion thereof outside of the quarantine area, except as hereinafter provided. During the months of January, November and December of each year cattle from the area quarantined by the Secretary of Agriculture for splenetic fever may be shipped without restrictions other than those imposed by state or territorial officers at point of destination."

Asbell's offense occurred in October, but his argument to show that there was a direct conflict was that the Kansas statute was inseparable, and made no exception for November, December and January as did the Rule, and hence that the statute was defective. Really the Rule and the Kansas statute operated in different fields, and Asbell's invocation of the Rule was irrelevant. The Rule was concerned only with movements from a quarantined area.

This Court very properly brushed aside Asbell's invocation of Rule 13, and apparently attached no significance to it. The decision in *Must Hatch Incubator Co. v. Patterson*, 27 Fed. (2nd) 447, at 449, appears to regard the reference to Rule 13 as full of meaning, but that was because the writer had not examined the Rule or the briefs in the Asbell case.

This Court, in the Asbell case, after noticing that *Reid v. Colorado* had decided that Congress did not by its act of 1884 forbid a statute such as that of Kansas, then said (page 257):

"There has, however, been later national legislation which needs to be noticed. Large powers to control the interstate movement of cattle liable to be afflicted with a communicable disease have been conferred upon the Secretary of Agriculture by the act of February 2, 1903, 32 Stat. 791, and the act of March 3, 1905, 33

Stat. 1204. The provisions of these acts need not be fully stated. The only part of them which seems relevant to this case and the question under consideration which arises in it is contained in the law of 1903. In that law it is enacted that when an inspector of the Bureau of Animal Industry has issued a certificate that he has inspected cattle or livestock and found them free from infectious, contagious, or communicable disease, 'such animals so inspected and certified may be shipped, driven, or transported * * * into * * * any State or Territory * * * without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture.' There can be no doubt that this is the supreme law, and, if the state law conflicts with it, the state law must yield. But the law of Kansas now before us recognizes the supremacy of the national law and conforms to it. The state law admits cattle inspected and certified by an inspector of the Bureau of Animal Industry of the United States, thus avoiding a conflict with the national law. Rule 13, issued by the Secretary of Agriculture under the authority of the statute, is brought to our attention by the plaintiff in error. It is enough to say now the rule is directed to transportation of cattle from quarantined states, which is not this case, and that in terms it recognizes restrictions imposed by the state of destination. Our attention is called to no other provision of national law which conflicts with the state law before us, and we have discovered none.''

Clearly the Supreme Court of the United States decided in that case that the acts of 1903 and 1905, which are the identical Acts of Congress now involved, had not occupied the ground so exclusively but that Kansas, in the absence of a federal quarantine, could impose a restriction upon the importation of cattle across her borders. The case has been many times cited as having that significance, and it never has been disapproved.

(e) The practical interpretation which the acts of Congress of 1903 and 1905 have received for many years is to the same effect as the judicial interpretation in Asbell v. Kansas, and it should be continued.

Miscellaneous Circular 14 issued by the Secretary of Agriculture and referred to in appellee's answering affidavit (R. 25) summarizes the vast body of state law which has grown up regulating the interstate movement of cattle. The statute books of the states show that the process has been going on for many years, encouraged by *Asbell v. Kansas,* by such opinions as *United States v. Hoover,* 133 Fed. 950, 952, and *United States v. Louisville, etc., Co.,* 176 Fed. 942, 947 (see as to this, the reasoning of the majority opinion, R. 64), and by the federal Department of Agriculture.

There are strong reasons against overturning such a body of law, thus brought into existence, continuing agreeably to the Secretary of Agriculture (R. 25-26) and consistently with the general policy of Congress manifested in all agricultural legislation of recent years. (See Acts of Congress referred to in footnote, page 12 of this brief.) The same considerations which favor accepting any well-established administrative interpretation of an ambiguous statute *(National Lead Co. v. United States,* 252 U. S. 140, 145; *United States v. Farrar,* 281 U. S. 624, 634; *McCaughn v. Hershey Chocolate Co.,* 283 U. S. 488, 492; *Costanzo v. Tillinghast,* 287 U. S. 341, 345) with greater reason favor continuance of the interpretation, judicial and administrative, which has been placed upon the acts of 1903 and 1905 and has encouraged the growth of this vast body of state law.

(f) In effect the Secretary of Agriculture has adopted the state laws and regulations relative to interstate movement of cattle infected with Bang's disease.

Such appears to be the general policy of the Secretary of Agriculture, evidenced by his Miscellaneous Circular 14, numerous acts of his subordinates, and his own letter of November 15, 1932. We see no practical objection, and no serious theoretical objection, to regarding his course as an adoption of the state laws and regulations relative to Bang's disease. Such a view of the matter has strong practical advantages and is a realistic treatment of the problem which is presented if *Asbell v. Kansas* is to be disavowed after twenty-seven years.

(g) The order now in question does not "burden" interstate commerce, nor does it in any way conflict with the federal statutes.

In many opinions which have been written it has been said that a state law which "burdens" or "directly burdens" interstate commerce is invalid. Reading the context, or reading other opinions, it is apparent that the verb is used in a somewhat special sense. It has reference less to the *effect* of the law, than to the *motive* which led to its enactment. See, as to this, the opinion in *Asbell v. Kansas,* or the quotations at pages 7 and 8 of this brief.

Appellants' brief at pages 18-19 argues that any order which goes farther than excluding animals actually diseased, and attempts to exclude those which have merely been exposed to infection, unconstitutionally "burdens" interstate commerce. The cases of *Hannibal etc. Co. v. Husen,* and *Asbell v Kansas,* are said to support that proposition. The contrary is established by reason and by many

cases, among them *Smith v. St. Louis etc. Co.,* 181 U. S. 248, 255-257, where it is said:

> "The prevention of disease is the essence of a quarantine law. Such law is directed, not only to the actually diseased, but to what has become exposed to disease. * * * Quarantine regulations cannot be the same for cattle as for persons, and must vary with the nature of the disease to be defended against."

At pages 23-24 of appellants' brief a different argument is put forward in somewhat indirect fashion. By quoting Judge Cooper it is argued that there is a direct conflict between the order and the federal statutes, as follows:

> "Justice Cooper also shows in his dissenting opinion that the statutes of New York accept the federal inspection and certificate of the individual animal and receives such animal as lawfully imported; *but that the October order of the Commissioner of Agriculture and Markets excludes and ignores the federal inspection and certificate entirely, whether the Secretary of Agriculture has acted or not acted,* and excludes all animals which are not certified by the chief live stock sanitary official of the state of origin, to be disease-free and to have come from a disease-free herd." [Italics ours.]

Neither the bill of complaint nor the plaintiffs' brief before the District Court suggested any direct conflict between the order and the federal statutes. Appellants make no such suggestion now, except by indirect quotation from Judge Cooper. The fact is, that issue originated with members of the District Court, and is a false issue. Counsel for appellants know that in a letter of October 4, 1932, from Henry S. Manley, Counsel to the New York State Department of Agriculture and Markets, to R. M. Orchard, Assistant Attorney General of Wisconsin, it was said:

> "We appreciate that we must permit the importation of animals accompanied by a federal certificate, under

provisions of U. S. Code, Title 21, § 121. Except to the extent that the federal government is willing to sponsor additions to our herds, we propose to adhere to the safeguards set forth in the order effective October 1, 1932."

Had the issue been an actual one the facts could have been made of record, and some of the discussion of this supposed issue in the majority and dissenting opinions (R. 65-66, 85-87) could have been avoided, as well as this departure from the record.

POINT III.

The decree below should be affirmed.

Respectfully submitted,

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Attorney General of the State of New York,

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